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No. (1)

Supreme Court, U.S.
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In The
Supreme Court of the United States

RYAN WHITESIDE,

Petitioner,

v.

RUSSELLVILLE NEWSPAPERS, INC., PAXTON MEDIA GROUP, LLC, NEAL RONQUIST, SCOTT PERKINS AND JANIE GINOCCHIO,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Arkansas

PETITION FOR A WRIT OF CERTIORARI

H. CLAY MOORE
Attorney at Law
4500 Montrose, Suite D
Houston, TX 77006
(713) 523-0123

ROBERT W. HIGGASON
(*Counsel of Record*)
Attorney at Law
6700 Woodlands Parkway,
Suite 230-247
The Woodlands, TX 77382
(832) 922-5402

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

This case presents the question whether the Fair Report Privilege under the First Amendment protects a media defendant from liability for reporting false and defamatory statements about a private party Petitioner based on information contained in an unconfirmed preliminary narrative in unofficial police documents not intended for release to the press. Specifically:

> Where media defendants receive an inadvertently released police document and know that it contains unconfirmed hearsay and investigative notes, is the publication of information from that document covered by the Fair Report Privilege?
>
> Is any Fair Report Privilege lost where a newspaper article goes beyond the "gist and sting" of the narrative in the inadvertently released police report by placing the false rape allegations in the context of an up-coming sensational murder trial?

PARTIES TO THE PROCEEDINGS

The Petitioner is Ryan Whiteside, who was plaintiff-appellant below.

The Respondents are Russellville Newspapers, Inc., Paxton Media Group, LLC, Neal Ronquist, Scott Perkins and Janie Ginocchio, all of whom were defendants-appellees below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully asks the Court to issue a writ of certiorari to review the final judgment of the Supreme Court of Arkansas. This case gives the Court the opportunity to correct Arkansas's extension of the Fair Report Privilege to actions that it was not intended to cover. By reviewing this case, the Court can strike the proper balance between two of society's most important competing rights – namely, having a responsible free press and protecting private individuals from defamation.

OPINION AND JUDGMENT BELOW

The circuit court's order is reprinted in the Appendix at App. 19-23. The Arkansas Supreme Court's opinion is unofficially reported at 2009 WL ___ and reprinted at App. 1-18. The order denying rehearing is reprinted at App. 26.

STATEMENT OF JURISDICTION

The Arkansas Supreme Court issued a judgment and opinion on March 12, 2009, involving a right or privilege under the Constitution of the United States. Petition for rehearing was denied on April 16, 2009. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press."

The Fourteenth Amendment extends the protection to State action: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

STATEMENT OF THE CASE

Introduction

This case presents a conflict between press freedom and the right of a private individual to protection of his reputation from defamation, which are both "plainly rooted in the traditions and significant concerns of our society." *The Florida Star v. B.J.P.*, 491 U.S. 524, 105 L.Ed. 2d 443 (1989).

The First Amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press."

The Fourteenth Amendment extends the protection to State action: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Freedom of the press is further encased in the Constitution of the State of Arkansas, Article 2, Section 6: "The liberty of the press shall forever remain inviolate. The free

communication of thought and opinions is one of the invaluable rights of man; and all persons may freely write and publish their sentiments on all subjects, *being responsible for the abuse of such right* [emphasis added]." This Court has long recognized that the freedom of the press is not absolute, and that among the limits on that freedom is a media defendant's potential liability for defamation. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

Petitioner sued for libel alleging that Respondents defamed him by falsely stating that he had engaged in a criminal sexual wrongdoing.

Respondents sought summary judgment based on the First Amendment as applied through the Fair Report Privilege.

Respondents admittedly acted without regard to the truthfulness of the statements in their newspaper articles.

The circuit court granted Respondents' motion for summary judgment, finding that Respondents were shielded from liability for the defamatory articles by the Fair Report Privilege.

The Proceedings Below

Petitioner sued Respondents for libel based upon three articles published by The Courier of Russellville, Arkansas, reporting on rape charges made to the Russellville police by two young women following

a holiday gathering of students attending Arkansas Tech University. (App. 1; T. 307)

On December 28, 2006, Petitioner and his roommates invited friends, including Kevin Jones, over for a holiday gathering at a house they rented to attend Arkansas Tech University. (T. 307) The students played card drinking games and drank beer. (T. 322-23) After a midnight trip to the Waffle House for food (T. 312), some of the group returned to the rental house where Jeff Simmons had sex with Jessica Roper. (T. 326)

Three days later, on New Year's Eve, Jessica Roper and her cousin, who was not at the gathering, gave statements to the Russellville Police in which Roper said that she had consumed a couple of alcoholic beverages at the gathering and woke up the next morning at the house where it was held and was sore "down there" but couldn't remember what had happened. The cousin's statement was that someone who was at the gathering told her that Simmons had given Roper something to drink and had sexual intercourse with her and that Petitioner had sexual contact with Roper. (T. 160)

The statements were attached to a police report, or blotter, giving the basic facts of the criminal allegations, on which was hand-written "Investigation – No Press." (T. 10-13, 337) The blotter and the witness statements were typed into the police AEGIS computer system without "permissions" or restrictions placed on the press access to the statements,

which was contrary to standard policy of the department. (T. 334-37; T. 345)

On January 10, 2007, The Courier daily newspaper in Russellville, obtained copies of the blotter and statements with the access key they had been given by the police. (T. 341) The police report which the author of the article was working from was not something that was downloaded and printed out the way it was from the AEGIS system; it was cut and pasted from the system and another reporter later added comments, so the author did not know what the actual AEGIS police report looked like at the time the article was written. (T. 356)

Because The Courier had been told by the press liaison with the police department, Lt. Falwell, not to expect anything but the blotter on the alleged rape, when a reporter with the paper was able to access it through AEGIS, the editor, Perkins, and the reporter he assigned to write a story, Ginocchio, called Lt. Falwell to find out what had happened. He said "you must have a good reporter because I'm locked out by permissions from accessing it myself and can't comment because the investigation has been turned over to the State Police." (T. 367, 368) The reporter called the prosecutor who had no comment because there was an ongoing investigation. (T. 139)

Perkins approved the reporter's story knowing that there was an ongoing investigation. (T. 360) He would not have run the report if his reporter had gone to the police station and obtained the written Case

Report stating "under investigation, no press." (T. 372) He further states: "I presume everything I can get on the Aegis system is a public document. It's possible that I was given the second part of that, the Christina Robison statement, by mistake." (T. 375) Being judicious about naming criminal suspects before the formal filing of charges is not the policy at The Courier. (T. 355) The publisher of The Courier, Ronquist, was fully involved throughout the day the story was formulated. (T. 361)

On January 11, 2007, The Courier ran a front page banner headline article captioned "ASP investigates alleged rape" which prominently mentioned the connection of Petitioner and Kevin Jones to the Nona Dirksmeyer murder case. The article paraphrased and quoted extensively the cousin's hearsay allegations that Jeff Simmons raped Jessica Roper and that Petitioner had sexual contact with her while she was under the influence of drugs. (T. 8-9, 169) The murder trial of Kevin Jones, in which Petitioner was considered to be a material witness, was to begin one week after the article was published. (T. 349)

On January 12, 2007, Prosecuting Attorney Gibbons issued his determination letter stating that he declined to file charges in the alleged rape because of email messages from Roper to Simmons on December 29, 2006, indicating that the sex between the two was consensual. The Determination Letter contained the following statements:

> Therefore, we are left with no evidence to support a charge of rape. It should be noted that there is no evidence at all that Ryan Whiteside or Kevin Jones, both of whom were also mentioned in the initial incident report, had any sexual contact with the complainant at any time during the 28th and 29th of December.

(T. 194)

The Courier obtained a copy of the prosecutor's letter on January 13, 2007, and ran a second article on Sunday, January 14, 2007, on its front page with a bold headline "No Charges Filed in Alleged Rape" (T. 169) which reported that Gibbons had made the determination not to file charges in the alleged rape because "the case wasn't strong enough to prove the rape allegation[.]" The second article also included a quote from Gibbons directly to the newspaper on January 13 that "there was a lack of evidence for prosecution" but it did not include the statement in the prosecutor's determination letter that there is no evidence at all that Petitioner had any sexual contact with the complainant. The second article repeated many of the cousin's hearsay allegations and added additional details from the State Police report. Such report included an interview with the alleged source of the information who denied she told the cousin anything negative about Petitioner and Kevin Jones. (T. 169)

In response to a complaint to Respondents from Petitioner's father (T. 119-20), the Respondents printed a third article about the alleged rape, the Clarification, which included the statement in the prosecuting attorney's Determination Letter exonerating Petitioner from any culpability, but which also added a statement that Simmons had told the State Police that Petitioner and Jones were in the room while Simmons allegedly had sex with the accuser and reminded readers of the connection to the "Jones Trial." (T. 17, 171)

In deposition testimony given in this cause, Petitioner denied having any sexual contact with Roper at the gathering (T. 316-17); Roper said Jeff Simmons had sex with her but nobody else did (T. 318); Huckabay said she never told Robison that she went back into the room and saw Petitioner having sexual contact with Roper (T. 200); Huckabay does not believe anyone other than Simmons engaged in any sexual act with Roper that night (T. 332); and Simmons never saw Petitioner have any kind of sex with Roper. (T. 327)

During the period of time the three articles about the alleged rape appeared in The Courier, Ginocchio posted online comments both in her own name and under an assumed name "lemoncello" to crimelibrary.com, an internet website which was a forum for debate about the Dirksmeyer murder case. (T. 362-65) Her intent was to be anonymous when commenting on her own articles in The Courier, and she didn't want anyone to see her name and think she was

speaking for the paper. (T. 363-64) Her "lemoncello" posts refer to Kevin Jones ("KJ") watching the alleged assault, which he "probably enjoyed, and did nothing to stop," attacking the character of Chelsea Huckabay for "not doing anything to stop it either," and warning "don't get raped in Pope County." (T. 362) Ginocchio was saying that even though the state's attorney decided not to prosecute, there really was something to those allegations. (T. 366)

The trial court granted Respondents' Motion for Summary Judgment on November 19, 2007, on grounds of the Fair Report Privilege. (T. 428)

The Supreme Court of Arkansas issued its opinion and judgment on March 12, 2009 (App. 1-18), and it overruled Petitioner's petition for rehearing on April 16, 2009. (App. 26)

REASONS FOR GRANTING THE PETITION

This case presents a clear opportunity to settle issues relating to the tension between competing rights – namely, having a responsible free press and protecting private individuals from false and defamatory publications by a media defendant. Some guidance has been provided by the Restatement (Second) of Torts § 611, which has been followed by many courts. In purporting to follow Section 611, the Arkansas Supreme Court, however, has expanded the Fair Report Privilege in such a way as to provide less protection to private individuals from irresponsible

press action than would be provided in other states, thereby violating Petitioner's Fourteenth Amendment rights.

With today's immediate electronic dissemination of information via the Internet and 24-hour television news, a private individual's reputation can be irreparably ruined, as with Petitioner, from the irresponsible actions of a media defendant.[1] This is not the intention of the First Amendment freedom of the press. Thus, it is important that this Court set a national minimum standard for the application of the Fair Report Privilege.

I. The Arkansas Supreme Court's Holding That Unconfirmed Witness Statements In Preliminary Police Reports Are Official Public Documents Covered By The Fair Report Privilege Is In Conflict With Other Jurisdictions.

The Fair Report Privilege is set out in the Restatement as follows:

> § 611. Report of Official Proceeding or Public Meeting

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[1] Harm to the reputation of private individuals from false and defamatory statements was illustrated by the recent case of the Duke University students who were wrongly accused of rape. In the Duke lacrosse case, however, the harm was the result of wrongdoing on the part of the district attorney, whereas the harm in the instant case is the result of wrongdoing on the part of the press.

> The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.

Restatement (Second) of Torts § 611. The comments thereto provide further guidance about what constitutes an official action:

> *h. Arrest.* An arrest by an officer is an official action, and a report of the fact of the arrest or of the charge of crime made by the officer in making or returning the arrest is therefore within the conditional privilege covered by this Section. *On the other hand, statements made by the police or by the complainant or other witnesses or by the prosecuting attorney as to the facts of the case or the evidence expected to be given are not yet part of the judicial proceeding or of the arrest itself and are not privileged under this Section.*

Id. at Comment h (emphasis added).

A. Respondents Based Their Articles On Unconfirmed Witness Statements In A Preliminary Police Narrative, Which Is Not A Public Document.

Two young women walked into the Russellville Police Department and gave statements to the

on-duty officer implicating Petitioner in an alleged rape. (T. 296-99) In making a hand-written recording of the statements, the officer was performing a ministerial act required of his position without regard to whether the accusations were hearsay or whether there was any truth whatever to the allegations. The statements were attached to a fill-in-the-blanks form on which the officer recorded the basic facts of the criminal allegations, known as a blotter, which is regularly released to the press. (T. 335) The witness statements are not part of the blotter and are not normally released if there is an ongoing investigation. (T. 334, 335)

This is consistent with the Arkansas Freedom of Information Act ("FOIA"), ACA 25-19-105, the only Arkansas statute that defines what constitutes "public records" and which specifically exempts certain records, including "undisclosed investigations by law enforcement agencies of suspected criminal activity. . . ." (105(a)(1)(A), (b)(6)). *Cf. Arkansas Gazette v. Goodwin*, 304 Ark. 204, 801 S.W.2d 284 (1990) (holding that Arkansas State Police's investigative file on Attorney General Steve Clark was protected from FOIA request by the Arkansas Gazette; with concurring opinion by Justice Turner discussing rationale underlying protection of preliminary investigative documents from public release). Whether the Russellville Police Department voluntarily released the subject witness statements is a material fact question in determining whether the statements are

"public" documents and thus subject to the Fair Report Privilege.

In overruling Petitioner's argument, the Arkansas Supreme Court held, "In the instant case, not only was a report filed based on these witness statements, an investigation commenced by both local and state police. For these reasons, we hold that there was an official action and the information released on the AEGIS system was covered by the fair-report privilege." (App. 10) That expansion of the privilege to cover inadvertently-released preliminary narratives and witness statements is inconsistent with Section 611 and with decisions from other jurisdictions.

B. Other Jurisdictions Have Held That Analogous Statements Are Not Protected By The Fair Report Privilege.

The Massachusetts case of *Reilly v. Associated Press*, 59 Mass. App. Ct. 764, 797 N.E.2d 1204 (2003), *review denied*, 441 Mass. 1103, 803 N.E.2d 333 (2004) involved a newspaper's reliance on the Fair Report Privilege where it reported witness statements from a police report made by a disgruntled dog owner whose pet died after allegedly negligent treatment by a veterinarian. The court's reasoning is cogent and clearly applicable in the instant case:

> The fair reporting privilege derives from the recognition that the general public has the right to know of official government actions that affect the public interest, that news

> outlets are the best way to disseminate such information, and that news outlets would be willing to make such reports only if they were free from liability ... *The privilege* applies to reports by news media outlets of official government action, such as the fact of an arrest, search warrant issued, or a crime charged; but it *does not apply to witness statements to police, whether appearing in an official police report or not, where no official police action is taken.* Such reports are unverified hearsay ... Such unconfirmed hearsay, upon which no police action was taken has neither the authority nor the importance to the public that other documents or statements shielded by the fair reporting privilege possess ... *Extending the privilege in this case would not further the public's interest in learning of official conduct.*

59 Mass. App. Ct. 764, 797 N.E.2d 1204 (2003), *review denied*, 441 Mass. 1103, 803 N.E.2d 333 (2004) (emphasis added).

The Tennessee case of *Lewis v. NewsChannel 5 Network L.P.,* applied to media reports of police arrests or stops, neither of which were involved in the instant case. 2005 WL 3237681 (Tenn. Cir. Ct. Jan. 10, 2005). The *Lewis* court states that the Fair Report Privilege should not be extended to apply to the:

> myriad types of informal reports and official and unofficial investigations, contacts, and communications of law enforcement personnel at all levels of the state and federal

> bureaucracy with local, regional, and national media . . . It should be applied only to reports of official actions or proceedings involving responsible, authoritative decision-makers who assume legal and political responsibility for their actions. Defamation: A Lawyer's Guide §3:10, at 3:30-3:31.

Id.

The court further distinguished reports of official actions that are public and protected by the privilege from the unconfirmed hearsay statements that are often in a preliminary unofficial report:

> Unofficial, off-the-record statements, especially when the source remains confidential, lack the dignity and authoritative weight of official actions and proceedings and, therefore, reports of these statements should not be protected by the fair report privilege. *Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78, 89 (D.C. 1980); *Jonathan Donnellan & Justin Peacock, Truth and Consequences: First Amendment Protection for Accurate Reporting on Government Investigations*, 50 N.Y.L. Sch. L. Rev. 237, 241 (2005-2006). The Restatement (Second) of Torts states that "[a]n arrest by an officer is an official action, and a report of the fact of the arrest or of the charge of crime made by the officer in making or returning the arrest" is within the *fair report privilege; however, "statements made by the police or by the complainant or other witnesses or by the prosecuting attorney as to the facts of the case or the evidence*

> *expected to be given are not yet part of the judicial proceeding or of the arrest itself are not.* Restatement (Second) of Torts § 611 cmt. h, at 301.

Lewis, 2005 WL 3237681 (Tenn. Cir. Ct. Jan. 10, 2005) (emphasis added).

Nevada's Supreme Court has also held that the privilege does not extend to unauthorized or confidential investigatory reports. The court refused to apply the privilege to a Scotland Yard document which was the basis for the defamatory article:

> The document was not available to the public, was never recognized as official by Scotland Yard itself, and was never sent to the British Gaming Control Board, the entity that had first asked for the report. The social policies underlying the fair-report privilege were never intended to permit statements in such documents to be repeated with impunity, to the detriment of the strong social interest in the protection of private reputation.

Wynn v. Smith, 16 P.3d 424 (Nevada 2001).

In *Phillips v. Evening Star Newspaper Company*, the District of Columbia Court of Appeals reasoned:

> the Star's reliance on the 'hot line' log as an official document to provide occasion for the official report privilege is misplaced and incorrect. This log representing the oral police communication from which the Star composed its article does not carry the

> dignity and authoritative weight as a record for which the common law sought to provide a reporting privilege.

424 A.2d 78, 89 (D.C. App. 1980).

That court held that the newspaper was potentially liable to the private individual Petitioner for negligence in reporting:

> This case presents the clashing of two important interests in society, the constitutional freedoms of speech and press against the important reputational interests of private individuals long committed to the State bailiwicks for protection. In light of the constitutional limitations announced by the U.S. Supreme Court in *Gertz*, the common law policy of the District of Columbia to protect private reputational interests and the inapplicability under the facts of this case of any common law privilege, the media Defendant Star is potentially liable to the private citizen Plaintiff, Phillips, for actual damages caused by its defamatory publication under a negligence standard.

Id. at 90.

C. Respondents Knew the Preliminary Report Was Unconfirmed and Unofficial.

Contrary to the trial court's finding in its Order of Dismissal that "there is no dispute that the police report . . . was voluntarily and legally released for

public consumption when [the Russellville Police Department] released the report and statements therein to the Appellees," Petitioner disputed the voluntariness of the release in his Opposition to Respondents' Motion for Summary Judgment (T. 283) and introduced deposition testimony into the summary judgment record that Lt. Falwell intended to set permissions in the computer system restricting the release of the witness statements portion of the police report, upon which the allegedly libelous publications were largely based. (T. 336, 340, 368)

The facts of this case are analogous to a person presenting a check for $100.00 to a bank teller and receiving $1,000.00 in cash. Once the customer realizes that he has $900.00 more than he is entitled to and then walks away with the money, he has committed theft. The Russellville Police Department intended to give The Courier the blotter portion of the police report but not the witness statements, which The Courier discovered when they called Lt. Falwell and the Prosecuting Attorney *before running the story in the first article.*

The original police report was hand-written and marked "Investigation, No Press" when it was left in the in-box of Lt. Charles Falwell of the Russellville Police Department. (T. 10-13, 337) Lt. Falwell, who at the time did press releases for the chief and who was in charge of Freedom of Information requests (T. 333), was reading the report when acting Chief of Police Ridenour took it from him and told him not to release anything on it because it was being turned over to the

State Police and to refer all calls to the prosecutor's office. (T. 339) Lt. Falwell testified that if the Report had not been taken from him, he would have told the secretary that permissions need to be locked down. (T. 340)

Further, the summary judgment evidence clearly establishes that the reporter, editor and publisher of The Courier all knew at the time they published (1) that there was an ongoing investigation into the alleged rape (Ginocchio T. 141; Perkins T. 370; Ronquist T. 69, 70), (2) that it was standard operating procedure for the Russellville Police Department not to release information from an ongoing investigation (T. 334), (3) that they were not supposed to have the narrative portion of the Police Report (T. 367-70), and (4) that the FOIA officer for the Russellville Police Department was himself locked out from accessing the Report. (T. 368)

Respondents Perkins and Ronquist immediately recognized upon receiving the Report that something was remiss because it had more detailed information than Falwell had led them to believe. (T. 381, 367-68) Perkins called Falwell for an explanation (T. 367-68) and was told that he was locked out from seeing the narrative and that he would have to speak with Gibbons regarding it, which was standard operating procedure when there was an ongoing investigation. (T. 334) Ginocchio called Gibbons, who confirmed that there was an ongoing investigation by telling her that he had not made a decision and would not until he reviewed the State Police report. (T. 344, 346)

Accordingly, it was abundantly clear to The Courier before it printed the article that it was not supposed to have the narrative portion of the report.

If The Courier had published the Report upon its receipt without making the calls to authorities, it might have a stronger case under the Fair Report Privilege. However, by making such calls they were put on notice that they did not have a public document within the broad release provisions of FOI, but rather had an investigative report exempted from release. Their choice of persons to call before publishing the article was curious. The only non-official they called was Jones' lawyer, and Jones was not accused of a crime in the Report. They obviously were not interested in whether there was any truth to the accusations but, rather, their connection with the murder case. They called Gibbons and the State Police to find out if "the girl" had recanted, but the alleged victim had not made any accusations to recant. The only accusations were made by her cousin who wasn't present at the gathering. They also called those officials to find out if there was still an active investigation; Gibbons said there was, and they couldn't reach the State Police by telephone.

Prior to the present case, the Arkansas Supreme Court had recognized the Fair Report Privilege in several cases, with varying results.[2] Under somewhat

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[2] *Butler v. Hearst-Argyle Television, Inc.*, 345 Ark. 462, 49 S.W.2d 116 (Ark. 2001); *Brandon v. Gazette Publishing Co.*, 234

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analogous circumstances in an earlier case, the Arkansas Supreme Court had ruled that the Fair Report Privilege did not protect a TV broadcast showing two individuals being placed in a squad car at a shopping mall and reporting that there had been a robbery attempt and an arrest when in fact no arrest had been made and no charges had been filed. *KARK-TV v. Simon,* 280 Ark. 228, 656 S.W.2d 702 (1983). The court stated that it did not reach the question whether the newscast was of an "official action" because even if so, the privilege was lost by an inaccurate report. By doing so the Supreme Court telegraphed a signal that the "official action" requirement of the Fair Report Privilege was an area of unresolved law in Arkansas. In the instant case, the court resolved that issue in a way that is contrary to other jurisdictions and which violated Petitioner's rights.

Ark. 332, 352 S.W.2d 92 (1961); *Jones v. Commercial Printing Co.*, 249 Ark. 952, 463 S.W.2d 92 (1971); *City of Fayetteville v. Rose*, 294 Ark. 468, 743 S.W.2d 817 (1988); *McCambridge v. City of Little Rock*, 298 Ark. 468, 219, 766 S.W.2d 909 (1989); *Martin v. Musteen,* 303 Ark. 656, 799 S.W.2d 540 (1990).

II. The Arkansas Supreme Court's Holding That Malice Is Irrelevant To The Fair Report Privilege Conflicts With Other Jurisdictions.

The Opinion stated:

> Finally, Whiteside argues that the privilege should not apply to the articles because of malice and excessive publication on the part of the Newspaper. However, it is clear that those issues are not part of the analysis under the fair-report privilege. This court has determined that the privilege is only lost by a failure to ensure that the report is accurate and complete or a fair abridgment.

(App. 18)

A. Respondents' Defamatory Articles Went Beyond The Gist Of The Original Police Narrative And Placed The Unconfirmed Rape Allegations In The Context Of A Sensational Murder Case.

If the Fair Report Privilege applies in this case to the witness statements, which Petitioner denies, Respondents must, in order to prevail, show that the newspaper reported the "gist" of the source documents. *KARK-TV v. Simon,* 280 Ark. 228, 656 S.W.2d 702 (1983); *Jones v. Commercial Printing Co.,* 249 Ark. 952, 463 S.W.2d 92 (1971). In other words, if the reports were not fair and accurate, the privilege is lost.

The fourth sentence of the article states: "The Courier obtained police documents from the Russellville Police Department's AEGIS computer system detailing the victim's complaint," which is an untrue statement. Actually, the victim did not make a complaint of criminal conduct, only stating that she had a couple of alcoholic drinks and woke up naked and sore but couldn't remember what happened. (T. 296-99) Had the allegations of rape trumpeted in the headlines of the article been accurately attributed to the cousin of the victim who was not even at the party and which were based entirely upon hearsay, the entire tenor and impact of the accusations against Petitioner would have been greatly reduced.

The most serious allegation made against Petitioner in the article is stated as follows: "According to the police report, Huckabay checked on the victim a second time and saw Whiteside allegedly having sexual contact with the victim while Jones allegedly watched. After Huckabay asked if the men planned on 'just taking turns,' she was told to leave again, according to the cousin's statement." The first sentence attributes the allegation to the police report, creating the impression that the allegation was a result-of-some-police determination. Only the second sentence about "taking turns" is correctly attributed to the cousin's hearsay statement. The very next statement, in a stand-alone paragraph, creates the same incorrect impression: "When Huckabay approached the bedroom a third time, she allegedly found the door locked, and *according to the police*

report [emphasis supplied], text-messaged Jones, who was in the bedroom with the victim, Whiteside and Simmons." That accusation was in the cousin's statement, not in the blotter. (T. 296-99) The article is replete with juxtaposition of "police report" and "cousin's statement," reasonably leading the reader to conclude that the police report represented an official action following investigation of the cousin's statement.

In the follow-up, the reporter for The Courier writes that no charges were filed by the Prosecuting Attorney because "the case wasn't strong enough to prove the rape allegation," and includes a direct quote to the paper that "the evidence was not strong enough" but failed to include the one sentence of prosecutor Gibbon's determination letter, which clearly is an official public document, that totally exonerated Petitioner: "It should be noted that there is no evidence at all that Ryan Whiteside or Kevin Jones, both of whom were also mentioned in the initial incident report, had any sexual contact with the complainant at any time during the 28th and 29th of December." (T. 195)

There was no good reason why that statement was not included in the follow-up. Instead, the follow-up includes a quote "there was a lack of evidence for prosecution," attributed to the Prosecutor in a conversation with the reporter after the determination letter was released (T. 169), thereby confusing a report of a public document with the reporter's own investigative reporting. The quote substituted for the

exoneration statement leaves room for doubt regarding Petitioner's culpability, reasonably implying that the decision not to file charges was a discretionary determination based upon conflicting evidence or other considerations. This alone is a fatal flaw in the follow-up and takes Respondents outside the Fair Report Privilege. The Clarification later published by the newspaper is an admission of fault in failing to accurately report the determination letter and in no way alters the fact that follow-up was not a fair and accurate report of said letter.

There is further reason to deny the protection of the Fair Report Privilege to the publication of the follow-up. At the time such article was published, the newspaper knew that the alleged source of the hearsay allegations in the witness statement denied making the allegations and had told the police that the statements were not true, yet the newspaper reported them again by way of background, thereby constituting actual malice and excessive publication.

Upon complaint by the Petitioner's family, The Courier ran the third article, the Clarification, which reported the "no evidence at all" determination by the Prosecutor but prefaced it with an unnecessarily derogatory statement that Petitioner was in the room while Simmons and Roper had sex: "although suspect Jeffrey Simmons confirmed to Arkansas State Police investigators that Kevin Jones and Ryan Whiteside were in the room while Simmons allegedly had sex with the accuser. . . ." (T. 170) Because such allegation had already been published by the paper and was

unrelated to the Prosecutor's determination, which The Courier had omitted, it clearly constitutes excessive publication, thereby waiving the Fair Report Privilege.

If a qualified privilege applies to a publication, it is lost if the publication is made with malice, or if made with lack of grounds for belief in its truthfulness, or if the privilege is abused by excessive publication. *Wal-Mart Stores Inc. v. Lee,* 348 Ark. 707, 74 S.W.3d 634 (Ark. 2002); *Superior Federal Bank v. Mackey,* 129 S.W.3d 324, 84 Ark. App. 1 (2003) and *Addington v. Wal-Mart Stores, Inc.,* 81 Ark. App. 441, 105 S.W.3d 379 (2003). Even if the Court concludes that the three articles published by Respondents were subject to a qualified privilege, that privilege was lost for all three articles for these reasons: Respondents reported in the first article the allegations from the Report without any reason to think they were true because they were obviously double hearsay, and Respondents did not ask for corroboration from the source of the information or inquire of any of the subjects of the rumors. The newspaper employees testified that they didn't care whether the underlying statements were true or not. That is malice under *New York Times Co. v. Sullivan.*

The paper rushed to publication because of the intense drive to publish anything connected to Nona Dirksmeyer's death in the belief that it would sell newspapers. The sub-headline of the article contained reference to the murder trial, and Petitioner and Jones were the first subjects of the article because of

their connection to the trial, even though Jones was not accused of any crime at the gathering and Petitioner was not the person who allegedly had sexual intercourse with the alleged victim.

That is both malice and excessive publication. Even when the Respondents attempted in the third article, the Clarification, to rectify their critical error in failing to include in the follow-up the statement in the prosecuting attorney's Determination Letter completely exonerating Petitioner from any culpability, they gratuitously added a statement that Simmons had told the State Police that Petitioner and Jones were in the room while Simmons allegedly had sex with the accuser. That is excessive publication and malicious. *Jones v. Commercial Printing Co.*, 249 Ark. 952, 463 S.W.2d 92 (1971).

While the three articles in The Courier were being published, the reporter on the first two, Defendant Ginocchio was posting to an internet website which was a forum for discussion of the Dirksmeyer murder case in her own name and under an assumed name disparaging the character of the subjects of the articles and stating her belief that even though the decision was made not to prosecute, there really was something to the allegations. There could be no clearer proof of her personal bias against and malice toward Petitioner and his friends at the gathering. It also explains why she wrote in the follow-up that there was a lack of evidence to prosecute rather than including Gibbons' statement in the Determination Letter that there was no evidence of rape and the

sentence stating there was "no evidence at all" that Petitioner had any sexual contact with the complainant.

B. Other Jurisdictions Have Held That The Fair Report Privilege Does Not Protect Media Defendants When It Is Abused.

The New Jersey Superior Court, Appellate Division, held that the Fair Report Privilege did not apply to newspaper articles that went beyond the "sting" of the original source documents, in *Salzano v. North Jersey Media Group,* 958 A.2d 1023 (N.J. Super. A.D. 2008).

The Illinois Supreme Court has also held that the Fair Report Privilege does not protect defamatory articles that go beyond the gist of the original documents. *Solaia Technology, LLC v. Specialty Publishing Co.,* 852 N.E.2d 825, 846 (Ill. 2006).

In another Illinois case, the appellate court held that even though the Fair Report Privilege applied there, it had been abused, and the summary judgment was reversed. *Newell v. Field Enterprises, Inc.,* 415 N.E.2d 434, 446, 452 (Ill. App. 1980).

The United States District Court for the District of Minnesota held that the Fair Report Privilege did not apply where the defamatory broadcast included a deputy's statements of unconfirmed suspicions: "In this case, . . . , the media defendants did much more

than reiterate or summarize official documents or proceedings. They broadcast Johnson's allegedly defamatory statements, statements nowhere to be found in any public record." *Stokes v. CBS, Inc.*, 25 F.Supp.2d 992, 1067 (D. Minn. 1998).

In the instant case, Respondents' false and defamatory articles suggesting that Petitioner had committed rape, repeatedly published in the context of a local sensational murder trial, went beyond the gist of the original police narrative. In doing so, Respondents abused any Fair Report Privilege that may have applied.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

H. CLAY MOORE
Attorney At Law
4500 Montrose Blvd.,
Suite D
Houston, TX 77006
(713) 523-0123

ROBERT W. HIGGASON
(*Counsel of Record*)
Attorney At Law
6700 Woodlands Parkway,
Suite 230–247
The Woodlands, TX 77832
(832) 922-5402

Attorneys for Petitioner

SUPREME COURT OF ARKANSAS

No. 08-313

RYAN WHITESIDE, APPELLANT, VS. RUSSELLVILLE NEWSPAPERS, INC., PAXTON MEDIA GROUP, LLC, NEAL RONQUIST, SCOTT PERKINS, & JANIE GINOCCHIO, APPELLEES,	**Opinion Delivered** March 12, 2009 APPEAL FROM THE POPE COUNTY CIRCUIT COURT, NO. CV-07-47, HON. DENNIS CHARLES SUTTERFIELD, JUDGE. *AFFIRMED.*

PAUL E. DANIELSON, Associate Justice

Appellant Ryan Whiteside appeals from the circuit court's order granting summary judgment to appellees Russellville Newspapers, Inc., Paxton Media Group, LLC, Neal Ronquist, Scott Perkins, and Janie Ginocchio (collectively, "the Newspaper") in an action for libel and defamation.[1] He further appeals from the circuit court's order denying his motion for new trial. Whiteside asserts four points on appeal: (1) that the circuit court erred in holding that witness statements in a police report were official public

[1] According to the complaint in this action, Russellville Newspapers, Inc. publishes the Courier News in Russellville; Janie Ginocchio authored the article; Scott Perkins is the editor of the Courier; Neal Ronquist is the publisher of the Courier; and Paxton Media Group is the owner.

documents; (2) that the circuit court erred in finding that witness statements in a police report were voluntarily and legally released; (3) that the circuit court erred in finding that the Newspaper's publications conveyed a substantially fair and correct account of a police report and a prosecutor's letter; and (4) that the circuit court erred in finding that no material facts were in dispute regarding whether the appellees were entitled to the benefit of the fair-report privilege. We affirm.

In January 2007, Neal Ronquist, publisher of the Newspaper, heard a radio report of an alleged rape and believed the Newspaper should look into the story. At that time, the Russellville Police Department allowed the Pope County media to access its AEGIS computer system through a dedicated terminal at the police department, and it determined what documents and records for which it would allow access through the AEGIS system. On January 10, 2007, the Newspaper obtained copies of a case report filed by one of the officers that had been on duty December 31, 2006. The case report revealed that a nineteen-year-old girl had been allegedly raped at a party at Whiteside's home on December 28, 2006. The details in the case report were based on information obtained from the alleged victim and her cousin. The Newspaper subsequently published articles based on the rape allegation and surrounding events.

On February 5, 2007, Whiteside filed his original complaint against the Newspaper. In it, he asserted a "claim and cause of action for libel and defamation

. . . to recover actual and exemplary or punitive damages for substantial and irreparable injury . . . caused and resulting from Defendants' publishing in the Courier of untruths and falsehoods concerning the integrity and character of the Plaintiff."

Whiteside's claims were premised upon an article published by the Newspaper on January 11, 2007, which stated that the Arkansas State Police were investigating an alleged rape that took place during a party at Whiteside's home. The article stated that the Newspaper had obtained police documents detailing the victim's complaint from the Russellville Police Department's AEGIS computer system. It further stated that, according to the police report, the victim's cousin recounted to police a conversation she had with Chelsea Huckabay, who had attended the party. In that conversation, the article stated, Huckabay said that "Jeffery Simmons allegedly put half a tab of the drug Ecstasy in the victim's glass of water, which she drank." Huckabay said that after hearing the victim crying, she checked on her, and she saw Simmons having sexual intercourse with the victim. She further told the victim's cousin, as reported in the article. that she returned to check on the victim and saw "Whiteside allegedly having sexual contact with the victim" while his friend allegedly watched. The article continued to set forth the events of that night, as allegedly relayed by Huckabay to the victim's cousin to the police. The Newspaper then reported that the victim underwent a rape examination, and

the clothes she wore to the party were placed into evidence.

Whiteside's complaint alleged that on January 4, 2007, prior to the article's publication, "the source of the hearsay allegations against Plaintiff reported to the Arkansas State Police that she did not tell the accuser's cousin that she saw anyone giving the accuser drugs, or that she saw Plaintiff having sexual contact with the accuser. She further told the State Police that 'she didn't feel that [the accuser] was being made to do things she did not want to do.'" Accordingly, Whiteside asserted, at the time of publication, no one had accused him of any misconduct based on firsthand information, "a fact that Defendants knew or reasonably should have known." In addition, Whiteside asserted in support of his claims, the Newspaper published a follow-up article on January 14, 2007, which he claimed omitted a statement by the local district attorney that there was no evidence that Whiteside had had sexual contact with the victim, and, further, recounted the majority of allegations made in the article of January 11. While the Newspaper did print a "clarification" on January 18, 2007, which included the statement of the district attorney, Whiteside asserted that the clarification "added salacious allegations not related to criminality."

On August 6, 2007, the Newspaper moved for summary judgment. It asserted that it was entitled to summary judgment for the "following three reasons, any one of which alone provides a sufficient

independent basis for" summary judgment in its favor:

> (a) Plaintiff Ryan Whiteside ("Whiteside") cannot prove the falsity of any of the statements in the articles which form the basis for Whiteside's libel action;
>
> (b) The three articles which form the basis for Whiteside's complaint are protected under the fair-report privilege, and there is no evidence that the fair-report privilege has been lost; and
>
> (c) Whiteside is a limited-purpose public figure who cannot prove actual malice.

On November 16, 2007, the circuit court held a hearing on the Newspaper's motion for summary judgment, and on November 19, 2007, the circuit court issued its order granting the motion and dismissing Whiteside's complaint with prejudice. Whiteside then filed a motion for new trial and relief from judgment on November 30, 2007, which the circuit court denied by an order issued on December 3, 2007. It is from those two orders that Whiteside appeals.

Whiteside first submitted a brief without a proper addendum in violation of Arkansas Supreme Court Rule 4-2(a)(8) (2008), and on December 11, 2008, this court ordered him to file a substituted abstract, addendum, and brief in compliance with our rules. *See Whiteside v. Russellville Newspapers, Inc., et. al*, ___ Ark. ___, ___ S.W.3d ___ (Dec. 11, 2008). He

has done so, and his appeal is now properly before this court.

Whiteside first argues that the witness statements that were released with the case report on the AEGIS computer system should not have been considered part of the official document subject to the fair-report privilege and, therefore, that the circuit court erred in granting summary judgment in favor of the Newspaper. The Newspaper avers that all the information obtained from the AEGIS system, including the portions of the case report that recount witness statements and the portions that detail the initial steps taken by the police officer on duty to investigate the allegations, constitutes official documents that led to an investigation by the Arkansas State Police and is covered by the fair-report privilege.

This court's standard of review for summary judgment is well settled:

> Summary judgment is to be granted by a trial court only when it is clear that there are no genuine issues of material fact to be litigated and the moving party is entitled to judgment as a matter of law. Once a moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. After reviewing undisputed facts, summary judgment should be denied if, under the evidence, reasonable minds might

> reach different conclusions from those undisputed facts. On appeal, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of its motion leave a material question of fact unanswered. This court views the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. Our review is not limited to the pleadings, as we also focus on the affidavits and other documents filed by the parties.

Sykes v. Williams, 373 Ark. 236, 239-40, ___ S.W.3d ___, ___ (2008) (internal citations omitted).

It is clear from the record that the circuit court based its order granting summary judgment in favor of the Newspaper on the fair-report privilege. Our court has previously recognized this privilege. *See Butler v. Hearst-Argyule Television, Inc.,* 345 Ark. 462, 49 S.W.3d 116 (2001); *KARK-TV v. Simon,* 280 Ark. 228, 656 S.W.2d 702 (1983). The fair-report privilege is defined in the *Restatement (Second) of Torts* § 611 (1977), captioned "Report of Official Proceeding or Public Meeting." Section 611 provides that:

> The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate

> and complete or a fair abridgment of the occurrence reported.

The first issue, therefore, is whether or not the information regarding the rape allegations in the underlying case that was obtained from the AEGIS system was a report "of an official action or proceeding." This is an issue of first impression in Arkansas; however, the comments to section 611 provide us with some guidance.

The comment on official proceedings explains:

> The privilege covered in this Section extends to the report of any official proceeding, or *any action taken by any officer or agency of the government of the United States, or of any State or of any of its subdivisions.* Since the holding of an official hearing or meeting is in itself an official proceeding, the privilege includes the report of any official hearing or meeting, even though no other action is taken. *The filing of a report by an officer or agency of the government is an action bringing a reporting of the governmental report within the scope of the privilege.*

Restatement (Second) of Torts § 611 cmt. d (1977) (emphasis added). While Whiteside relies on comment h to section 611, that comment specifically deals with an arrest situation. The witness statements Whiteside complains of in the instant case were not part of an arrest. Here, the statements made were not only attached to the blotter as part of the

official police report, but were included in the report itself in the officer's narrative.

Case law from various jurisdictions supports the principle that, generally, information released by the police, including reports and records, is considered to be a report of an official action subject to the fair-report privilege. *See Yohe v. Nugent,* 321 F.3d 35 (1st Cir. 2003) (statements made to the press by the police chief based on witness statements); *Kenney v. Scripps Howard Broad. Co.,* 259 F.3d 922 (8th Cir. 2001) (information obtained from a missing-person report, a pick-up order, and an investigative report); *Porter v. Guam Publ'n, Inc.,* 643 F.2d 615 (9th Cir. 1981), *cert. denied,* 454 U.S. 940 (1981) (a police investigation obtained from a "daily police bulletin" of criminal complaints and arrest reports, even when based on false charges made by the complainant); *Northland Wheels Roller Skating Ctr. Inc. v. Detroit Free Press, Inc.,* 213 Mich. App. 317, 539 N.W.2d 774 (1995) (information obtained from the police department's written reports or records generally available to the public); *Erickson v. Pulitzer Publ'g Co.,* 797 S.W.2d 853 (Mo. Ct. App. 1990) (information obtained from incident reports of the police department); *Biermann v. Pulitzer Publ'g Co.,* 627 S.W.2d 87 (Mo. Ct. App. 1981) (information obtained from arrest warrants, bonds, and affidavits of the prosecuting attorney that were taken from police department files); *Thomas v. Tel. Publ'g Co.,* 155 N.H. 314, 929 A.2d 993 (2007) (information obtained from a pre-sentence investigation report); *Goss v. Houston Cmty. Newspapers,* 252

S.W.3d 652 (Tex. Ct. App. 2008) (information obtained from a press release). In the instant case, not only was a report filed based on these witness statements, an investigation commenced by both local and state police. For these reasons, we hold that there was an official action and the information released on the AEGIS system was covered by the fair-report privilege.

Whiteside next alleges that the witness statements were illegally released and the Newspaper committed theft by retaining the statements and converting them to their pecuniary gain after learning that they did not have voluntary possession of the statements. The Newspaper avers that this argument is made for the first time on appeal and, in addition, that the Newspaper should not be faulted for obtaining the report on the AEGIS system when it was placed there by an employee of the police department devoid of any restrictions. Furthermore, the Newspaper contends that there is no evidence that anyone asked it to return the information or refrain from publishing it.

We agree that Whiteside argues for the first time on appeal that the Newspaper committed theft. Whiteside's counsel in fact stated to the court at the hearing, "[w]ell, they really didn't steal anything," before continuing on to analogize the situation to someone finding another person's billfold on the sidewalk with a thousand dollars in it. This court has repeatedly held that we will not address an argument

raised for the first time on appeal. *See Sykes v. Williams,* 373 Ark. 236, ___ S.W.3d ___ (2008).

Further, we find no merit in Whiteside's argument that the circuit court erred by finding that the report was voluntarily and legally released. The evidence presented by Whiteside illustrates, at best, that the release was inadvertent.

In reviewing the record, it is undisputed that the Russellville Police Department used the AEGIS computer system to manage their records and, at the time of the instant case, allowed the Newspaper to access the blotter. Normally, the blotter contained everything from a case report but the narrative portion. The officer that filed the report included a narrative portion that Lieutenant Charles Falwell of the Russellville Police Department admitted should not have been part of the blotter; however, it was released on the AEGIS system in the case report. Scott Perkins, editor of the Newspaper, testified that he called Falwell inquiring about an alleged rape and its report but was told that there would not be much in the report. When Perkins accessed the report, he got a more detailed incident report than he expected and called Falwell again. Perkins testified that Falwell simply said he was locked out of the report and that Perkins must have a good reporter. Falwell admitted that he did not tell Perkins there were any restrictions on the release of the information in that case report or that the report should not have been released. There is no evidence in the record that suggests the Newspaper obtained this information

dishonestly. On the contrary, the evidence shows the Newspaper obtained the information through the AEGIS system, a system that the police specifically permitted the Newspaper to access. While the release of a specific portion of the report may have been a mistake made by the police, it was not the result of any wrongdoing by the Newspaper.

Whiteside argues that the Newspaper should have known that the witness statements were not supposed to be part of the blotter. However, there is nothing to suggest that the privilege is lost because the Newspaper failed to investigate whether or not it was supposed to have access to that portion of the report. In fact, the United States Supreme Court has held that the First Amendment protects against the "timidity and self-censorship" that may result from such an approach. *See The Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (citing *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975)). The Court in *The Florida Star* stated:

> [D]epriving protection to those who rely on the government's implied representations of the lawfulness of dissemination, would force upon the media the onerous obligation of sifting through government press releases, reports, and pronouncements to prune out material arguably unlawful for publication. This situation could inhere even where the newspaper's sole object was to reproduce, with no substantial change, the government's rendition of the event in question.

Id. at 536.

It seems clear that an inadvertent release of information is not analogous to an involuntary release or an illegal gain of information. As discussed, the record is devoid of any evidence of any wrongdoing on the part of the Newspaper in obtaining the information. It was not incumbent upon the Newspaper to determine what information could or could not be published after its release by the police. Therefore, we affirm the circuit court's finding that the information was lawfully and legally obtained.

For his final point on appeal, Whiteside argues that if the privilege applied in this case, it was lost because the articles were not a fair and accurate report. The Newspaper avers that the articles were substantially accurate reports of information taken from official documents and that it conveyed the required gist or sting of that information.

This court has previously discussed the privilege granted by section 611 and the loss of that privilege should the publisher not give a fair and accurate report:

> According to the comments to section 611, the basis of the privilege is the "interest of the public in having information made available to it as to what occurs in official proceedings and public meetings." [*Restatement (Second) of Torts* § 611 (1977)], cmt. a. Significantly, the privilege exists "even though the publisher himself does not believe the defamatory words he reports to be true and even when he knows them to be

> false. Abuse of the privilege takes place, therefore, when the publisher does not give a fair and accurate report of the proceeding." *Id.*
>
> With regard to the accuracy and fairness of the report, it is enough that it conveys a substantially correct account of the proceedings. *Id.*, cmt. f. Furthermore, although it is unnecessary that the report be exhaustive and complete, it is necessary that nothing be omitted or misplaced in such a manner as to convey an erroneous impression. *Id.* The privilege does not apply where a person testifies in a proceeding solely for the purpose of obtaining the fair-report shield for himself or in collusion with a third party. *Id.*, cmt. c.

Butler v. Hearst-Argyule Television, Inc., 345 Ark. 462, 468, 49 S.W.3d 116, 119-20 (2001).

In addition to considering the comments provided in section 611, this court has applied the substantial-truth doctrine in testing the accuracy of a report. *See KARK-TV v. Simon,* 280 Ark. 228, 229, 656 S.W.2d 702, 703 (1983). The literal truth is not necessary, the substantial truth will suffice, and, as long as the gist or the sting of the publication is in essence true, some minor conflicts in what was alleged will not eliminate the privilege. *See id.* (citing *Pritchard v. Times Sw. Broad., Inc.*, 277 Ark. 458, 642 S.W.2d 877 (1982)).

Whiteside alleges that there were several statements included in the articles that made them

unfair and inaccurate. One sentence in the January 11, 2007 article reads: "The Courier obtained police documents from the Russellville Police Department's AEGIS computer system detailing the victim's complaint." Whiteside argues that statement is false because the victim did not make a detailed complaint of criminal conduct. We do not agree. While the report was made by both the victim and her cousin, the report clearly lists the victim's name as the victim, and details were placed in the report by both of the women.

Additionally, Whiteside argues that "the article is replete with juxtaposition of 'police report' and 'cousin's statement,' reasonably leading the reader to conclude that the police report represented an official action following investigation of the cousin's statement." Again, we do not agree. Before several of the cousin's statements were revealed in the article, the article specifically reads: "In a separate statement given to police, the victim's cousin recounted a Dec. 31 conversation she had with Chelsea Huckabay, who was at the party, about what allegedly happened." The next few paragraphs discuss the details of what, according to the victim's cousin, Chelsea Huckabay had witnessed. While a few sentences attributed the information to the report rather than the cousin's statement, it is clear when looking at those paragraphs as a whole, that the information had been gathered from the report, as recounted to the police by the victim's cousin. This court cannot hold that the article was not an accurate and complete or a fair

abridgment of the occurrence reported. Although the information came from the victim's cousin, all but one of the details published was recorded in the actual police report.[2] Therefore, while the juxtaposition of "police report" and "cousin's statement" might have been a bit confusing, we cannot hold it was enough to eliminate the privilege.

The Newspaper published a follow-up article on January 14, 2007, based upon statements made by David Gibbons, the prosecuting attorney, and a letter that Gibbons wrote on January 12, 2007, to Stacie Rhoads, a special police agent. The article revealed that no charges were filed in the case because, as the letter stated, "the [Arkansas State Police]'s interview with Huckabay 'produced a scenario diametrically opposed' to what was alleged in the initial police report," and because, as Gibbons explained, "there was a lack of evidence for prosecution." Also provided in the article was the background of the case from the

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[2] The Newspaper admitted that the sentence stating "When Huckabay approached the bedroom a third time, she allegedly found the door locked, and according to the police report, text-messaged Jones, who was in the bedroom with the victim, Whiteside and Simmons," was actually not included in the police report. However, Whiteside admits that the accusation was part of the cousin's statement and does not challenge that as a false fact. On the contrary, Whiteside admitted that he locked his bedroom door, and that he and Jones stayed in the room while Simmons had sexual intercourse with the victim. In addition, the very next sentence in the article regarding an alleged text-message response from Jones clarifies that it was according to the cousin's statement.

initial police report and additional details gathered from the Arkansas State Police investigation. The article further revealed that Huckabay's story was very different from what the alleged victim's cousin told the police and that Simmons had admitted to consensual sex. A part of Rhoads's report was published which declared "it was apparent that [the accuser] had some knowledge of the events and even joked with the encounters [sic]." Two of the alleged victim's text messages that she sent to Simmons after the alleged incident were also published, and the article explained that there were seven more.

Whiteside contends that the follow-up article was not protected by the fair-reporting privilege because it did not include the sentence from Gibbons's letter that "totally exonerated" Whiteside, and there was "no good reason why such sentence was not included in the Follow-up." First, this argument is irrelevant because Whiteside is not claiming he was defamed by the new information included in the follow-up article; therefore, the Newspaper has no reason to invoke that privilege. While the follow-up article did repeat information from the first article, because we hold that the privilege applies to the fair and accurate report of that information, the second publication of the same information is of no significance. Furthermore, Whiteside does not cite any authority or provide a meritorious argument as to why the omission of a single sentence is equivalent to the failure of the Newspaper to report the "gist" or the "sting" of the situation. It is elementary that this

court will not consider an argument if the appellant does not make a convincing argument or cites no authority to support it. *See Maulding v. Price's Util. Contractors, Inc.*, ___ Ark. ___, ___ S.W.3d ___ (Feb. 12, 2009).

Finally, Whiteside argues that the privilege should not apply to the articles because of malice and excessive publication on the part of the Newspaper. However, it is clear that those issues are not part of the analysis under the fair-report privilege. This court has determined that the privilege is only lost by a failure to ensure that the report is accurate and complete or a fair abridgment. *See Butler,* 345 Ark. at 469, 49 S.W.3d at 121. We hold that the Newspaper fairly and accurately reported the information as released by the police on the AEGIS system.

For these reasons, we affirm the circuit court's order granting summary judgment in favor of the Newspaper, and we affirm the circuit court's order denying Whiteside's motion for a new trial.

Affirmed.

IN THE CIRCUIT COURT OF
POPE COUNTY, ARKANSAS
DIVISION IV

RYAN WHITESIDE PLAINTIFF

VS. No CV-2007-47

RUSSELLVILLE
NEWSPAPERS, INC.,
PAXTON MEDIA
GROUP, LLC,
NEAL RONQUIST,
SCOTT PERKINS, and
JANIE GINOCCHIO

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND DISMISSING PLAINTIFF'S COMPLAINT WITH PREJUDICE

(Filed Nov. 19, 2007)

A hearing was held on Friday, November 16, 2007 in the above referenced case on the defendants' Motion for Summary Judgment in the above referenced case. At the conclusion of the hearing, the court took the matter under advisement. The court now enters its order:

Arkansas Rules of Civil Procedure 56 sets out the standard that guides this court in its consideration of the defendants' Motion for Summary Judgment. Pursuant to Rule 56 a "judgment shall be rendered shall be rendered [sic] forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, shows

that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law on the issues specifically set forth in the motion."

This court first addresses the issue of whether or not there exists any genuine issue as to material fact in this case which would prevent the entry of a judgment in this matter at this time. In doing so, this court must first consider the fair-report privilege raised by the defendants specifically and whether or not there is any genuine issue of material fact existing as to the assertion of this privilege. If the defendants can successfully claim the fair-report privilege then neither the legal status of the plaintiff as a private or public person nor whether malice exists matters, and all other issues raised by the motion become moot.

There is no factual dispute that the plaintiff's cause of action is based upon newspaper articles published on January 11, 2007 and January 15, 2007. The contents of those written publications plainly are not in dispute. There is no factual dispute that the January 11, 2007 newspaper story was based upon a December 31, 2006 police report, witness statements and documents generated by the Russellville Police Department. The contents of the Police Department documents are not in dispute.

There is no factual dispute as to the contents of the January 15, 2007 article or that it was based upon the December 31, 2006 police report and

documents of the Russellville Police Department and a January 12, 2007 letter from Prosecuting Attorney David Gibbons. There is no factual dispute as to the contents of the January 12, 2007 letter.

Therefore, this court finds that there are not disputes regarding any material facts as regards as to the issue of whether or not the defendants in this case are entitled the benefit of the fair-report privilege. It only remains for this court to apply the law to these uncontested facts. The articles speak for themselves and so does the police report, documents and prosecuting attorney's letter.

First, the court would state that the uncontested facts establish that the police report, witness statements and prosecutor's letter, upon which the defendants rely, are official public documents.

There is no dispute that the police report was generated by the Russellville Police Department in the course of an official police investigation and that it was voluntarily and legally released for public consumption when it released the report and statements therein to the defendants. There is also no dispute that the letter of Prosecuting Attorney, David Gibbons, is an official public document voluntarily and legally released for public consumption.

The legal question that remains is whether or not the Courier's publications convey a substantially correct account of the Russellville Police Department Report and the prosecutor's letter. This court finds that they do. It is not necessary that the report be

exhaustive and complete, but it is necessary that nothing be omitted or misplaced in such a manner as to convey an erroneous impression.

In testing the accuracy of the reporting under the fair-report privilege, this court is required to apply "the substantial truth doctrine" recognized in the case of *Pritchard v. Times Southwest Broadcasting, Inc.*, 458, 642 S.W.2d 877 (1982). Under that doctrine, the literal truth is not necessary and substantial truth, sometimes referred to as the "gist" or the "sting", will suffice. In other words, under the fair-report privilege, the gist of the "sting" of an official action or proceeding must be accurately conveyed in the publication.

The court finds that the publications at issue in this case were a fair and substantially true account of the police report, police documents and prosecutor's report and that there is no showing of that these publications stated any untruths outside that context. The police reports, statements and other documents may contain untruths, but as long as the defendants gave a substantially fair account of the contents of those documents then they are not liable under the fair-report privilege doctrine.

Therefore the court grants the defendants' Motion for Summary Judgment and dismisses the plaintiff's complaint with prejudice.

IT IS SO ORDERED.

/s/ Dennis C. Sutterfield
DENNIS C. SUTTERFIELD
CIRCUIT JUDGE
DATE: November 19, 2007

Copy To:

Mr. H. Clay Moore
Attorney at Law
713-523-0140

Mr. R. David Lewis
Attorney at Law
501-664-3884

Mr. John E. Tull, III
Attorney at Law
501-379-1701

IN THE CIRCUIT COURT OF
POPE COUNTY, ARKANSAS
DIVISION IV

RYAN WHITESIDE PLAINTIFF

vs. No CV-2007-47

RUSSELLVILLE
NEWSPAPERS, INC.,
PAXTON MEDIA
GROUP, LLC,
NEAL RONQUIST,
SCOTT PERKINS, and
JANIE GINOCCHIO

ORDER DENYING MOTION FOR NEW TRIAL AND RELIEF FROM JUDGMENT; AND CLARIFICATION

(Filed Dec. 3, 2007)

Now comes before the court the plaintiff's Motion for New Trial and Relief form Judgment and the same is hereby denied.

Further, the court states as a point of clarification that its decision was indeed based upon a consideration of all three newspaper articles referred to in the plaintiff's complaint along with all of the other pleadings, exhibits and affidavits herein; and respective arguments of counsel.

IT IS SO ORDERED.

/s/ Dennis C. Sutterfield
DENNIS C. SUTTERFIELD
Circuit Judge
Date: 12-3-07

COPY TO:

Mr. R. David Lewis
Attorney at Law
501-664-3884

Mr. John E. Tull, III
Attorney at Law
501-379-1701

Leslie W. Steen
Clerk

Office of the Clerk
Supreme Court of the
State of Arkansas
Arkansas Court
of Appeals
Justice Building
625 Marshall Street
Little Rock, Arkansas
72201

April 16, 2009

H. Clay Moore
Attorney at Law
4500 Montrose Blvd., Ste. D
Houston, TX 77006

R. David Lewis
Attorney at Law
1109 Kavanaugh Blvd.
Little Rock, AR 72205

RE: 08-313. Ryan Whiteside v. Russellville Newspapers, Inc. et al.

Dear Attorneys:

The Arkansas Supreme Court made the following order today in the above styled case:

"Petition for rehearing is denied."

Sincerely,

/s/ Leslie W. Steen
Leslie W. Steen, Clerk

WS:jko

cc: E.B. Chiles
John E. Tull
Fern Tucker, Clerk
(CV-07-47)

137

No. 09-67

Supreme Court, U.S.
FILED
AUG 14 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

RYAN WHITESIDE,

Petitioner,

v.

RUSSELLVILLE NEWSPAPERS, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF IN OPPOSITION

JOHN E. TULL III
E. B. CHILES IV*
KRISTINE G. BAKER
QUATTLEBAUM, GROOMS,
TULL & BURROW PLLC
111 Center Street, Suite 1900
Little Rock, Arkansas 72201
(501) 379-1700

* *Counsel of Record* *Attorneys for Respondents*

224522

CP

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

Respondent Russellville Newspapers, Inc. is wholly owned by respondent Paxton Media Group, LLC. Paxton Media Group, LLC has no parent corporation, and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

Factual Background. In early January 2007, Neal Ronquist, the publisher of *The Courier*, a newspaper in Russellville, Arkansas, heard a radio report about an alleged rape on December 28, 2006. Ronquist asked *Courier* editor Scott Perkins whether the newspaper had published a story on the subject. Perkins and Ronquist discussed the issue again after Perkins received information that some of the persons involved had connections to the upcoming trial of Kevin Jones for the murder of Nona Dirksmeyer in December 2005. Dirksmeyer's murder and the State of Arkansas's charge of first-degree murder against Jones received so much attention that Jones eventually moved for a change of venue. Perkins intended to see whether a police report regarding the alleged events of December 28 existed.

The Courier had access to the AEGIS computer system of the Russellville Police Department through a dedicated Police Department terminal. The Police Department determined what documents to make available to *The Courier* through the AEGIS system. Perkins called Police Department employee Charles Falwell to inquire about a police report regarding the alleged rape on December 28. Perkins told Falwell that a *Courier* reporter had gone to the Police Department to get any available police report. Falwell indicated that the police report might not contain much information but told Perkins that *The Courier* could have the information available to *The Courier* in the AEGIS system.

Within the next 15 to 30 minutes, Perkins had reviewed information *The Courier* obtained from the AEGIS system regarding a Case Report by Officer Lee Goemmer dated December 31, 2006. *The Courier* obtained more information from the AEGIS system than Perkins had anticipated based on his conversation with Falwell, so Perkins called Falwell again and told Falwell that the information from the Case Report was more extensive than Falwell had suggested. Falwell did not tell Perkins that the Police Department should not have released extensive information from the Case Report, that the Police Department had imposed any restrictions on releasing information from the Case Report, or that *The Courier* should not run a story based on information from the Case Report. Falwell told Perkins that the Police Department had turned over the investigation to the Arkansas State Police and referred Perkins to David Gibbons, a local prosecuting attorney. Perkins then called Gibbons and told Gibbons that *The Courier* had obtained a report from the Police Department and was looking at publishing an article based on it.

Ronquist believed that *The Courier* should consider an article based on the information from Officer Goemmer's Case Report because the allegations in the Case Report involved Jones, who was charged with Dirksmeyer's murder, and Ryan Whiteside and Chelsea Huckabay, who were expected to testify at Jones's trial. The information from the Case Report revealed that it had been alleged that 19-year-old Jessica Roper was raped at a party at Whiteside's home in Russellville on December 28 and 29, 2006. Officer Goemmer based the Case Report on information obtained from Roper and her cousin, Christina Robison. While Robison did not

attend the party, Robison relayed to Officer Goemmer a conversation she claimed to have had with Huckabay, who did attend the party. Police Department records identified Jones, Whiteside, and Jeffery Simmons as suspects. Officer Goemmer's Case Report explained that Huckabay was not available for an interview at the time of the report. It also detailed Officer Goemmer's accompanying Roper to retrieve the clothing she wore the night of the party at Whiteside's home and to undergo a rape examination at a hospital. It described the chain of custody of the clothing and the materials from the rape examination. It explained that Officer Goemmer passed off the remainder of the investigation to a detective who responded to Officer Goemmer's call.

Perkins asked reporter Janie Ginocchio to look into writing about the State Police's investigation of the allegations Roper and Robison made to Officer Goemmer. Ginocchio wrote an article based on the information from the Case Report *The Courier* obtained from the Police Department and her interviews of Gibbons and Commander Bill Beach of the State Police. Through Gibbons and Beach, Ginocchio verified that the State Police were investigating the allegations Roper and Robison made. Ginocchio's article appeared in *The Courier* on January 11, 2007, under the headline "ASP looks into alleged rape." The subheadline read, "3 named in police report linked to Dirksmeyer murder trial."

On Saturday, January 13, 2007, Gibbons faxed to Ginocchio an Investigative Summary dated January 12, 2007, prepared by Arkansas State Police Special Agent Stacie Rhoads and Gibbons's letter to Rhoads of the

same date. Ginocchio learned at that time that Gibbons had decided not to prosecute any of the suspects and that Huckabay denied making the allegations that Robison reported to the Police Department. Gibbons told Ginocchio in a telephone conversation that he found insufficient evidence to prosecute but that Roper had not recanted her allegation of rape and that Gibbons did not intend to charge Roper with filing a false police report. Ginocchio wrote an article that appeared the following day in *The Courier* under the headline "No charges filed in alleged rape." The subheadline read, "Prosecutor cites lack of evidence; those mentioned have links to Jones trial."

After the publication of the second article, Perkins met with Dennis Whiteside, Ryan Whiteside's father. Dennis Whiteside showed Gibbons's January 12 letter to Perkins and asked Perkins why the second article did not contain a statement from the letter that "there is no evidence at all Ryan Whiteside or Kevin Jones . . . had any sexual contact with the complainant . . . ." *The Courier* then published a "Clarification" that included that statement.

Procedural History. Less than a month after the publication of the "Clarification," petitioner Ryan Whiteside filed suit in the Circuit Court of Pope County, Arkansas, against respondents Paxton Media Group, LLC, its wholly owned subsidiary Russellville Newspapers, Inc., Ronquist, Perkins and Ginocchio (collectively, "Paxton Media") and claimed that the articles published in *The Courier* defamed him. Following extensive discovery, Paxton Media moved for summary judgment on three independent bases. For one of its

grounds, Paxton Media argued that the fair-report privilege protects Paxton Media from liability based on the articles at issue because the allegedly defamatory statements reflected a fair abridgement of the contents of official government documents. As articulated in the Restatement (Second) of Torts and adopted in Arkansas, the fair-report privilege provides that "'[t]he publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting on a matter of public concern is privileged if the report is accurate and complete or a fair abridgment of the occurrence reported.'" App. 7-8 (quoting *Restatement (Second) of Torts* § 611 (1977)).

The Circuit Court granted summary judgment in Paxton Media's favor because the undisputed facts show that the fair-report privilege shields Paxton Media from liability. *Id.* at 19-22. In its summary-judgment decision, the Circuit Court observed that Whiteside based his defamation claim on two articles published in *The Courier* and that no one disputes the contents of those written publications. *Id.* at 20. The Circuit Court also noted that it is undisputed that Ginocchio based the first article on documents generated by the Russellville Police Department and that no one disputes the contents of those police-generated materials. *Id.* The Circuit Court found no dispute that Ginocchio based the second article on the same materials generated by the Police Department and the January 12, 2007, letter from Gibbons, whose contents no one disputes. *Id.* at 20-21. Given these undisputed facts, the Circuit Court held that no genuine issue of material fact exists with respect to the application of the fair-report privilege. *Id.* at 21.

Applying Arkansas law to these undisputed facts, the Circuit Court held that the documents on which Ginocchio relied in preparing the articles were official public documents that the Police Department and Gibbons voluntarily and legally released. *Id.* The Circuit Court also held that the articles gave a substantially fair report of the contents of the official public documents on which Ginocchio based the articles. *Id.* at 21-22. The Circuit Court therefore held that the fair-report privilege protects Paxton Media from liability and dismissed Whiteside's complaint with prejudice. *Id.* at 22.

Whiteside moved for a "new trial" and for "relief from the judgment." *Id.* at 24. The Circuit Court denied Whiteside's motion and clarified that it based its summary-judgment decision on consideration of all three articles cited in Whiteside's complaint; all other pleadings, exhibits, and affidavits of record; and the lawyers' arguments. *Id.*

The Supreme Court of Arkansas affirmed. The Supreme Court of Arkansas observed at the outset of its analysis that it had "previously recognized" the fair-report privilege. *Id.* at 7. It then quoted section 611 of the Restatement (Second) of Torts for a description of the privilege. Taking in turn each point on appeal raised by Whiteside, the Supreme Court of Arkansas held (1) that "there was an official action and the information released on the AEGIS system was covered by the fair-report privilege," *id.* at 10; (2) that there was "no merit in Whiteside's argument that the circuit court erred by finding that the report was voluntarily and legally released," *id.* at 11; and (3) that Paxton Media "fairly and accurately reported the information as released by the police on the AEGIS system." *Id.* at 18. The Supreme Court of Arkansas denied Whiteside's later petition for rehearing. *Id.* at 26.

REASONS FOR DENYING THE PETITION

This Court should deny the petition for a writ of certiorari for at least three good reasons. First, the petition raises no important issue of federal law; the decision of the Supreme Court of Arkansas turned on Arkansas common law regarding the fair-report privilege, not the First Amendment. Second, the petition fails to identify any decision of this Court, a federal court of appeals, or a state court of last resort that conflicts with the decision of the Supreme Court of Arkansas. Third, the petition constitutes no more than an argument about the application of uncontested principles of Arkansas law to the peculiar facts of this particular case. No basis for certiorari exists.

A. The Petition Raises No Important Issue of Federal Law

Whiteside unpersuasively attempts to generate a dispositive federal issue in his petition. He says that the case "presents the question whether the Fair Report Privilege under the First Amendment protects a media defendant from liability" under these facts. Pet. i. He also says that "it is important that this Court set a national minimum standard for the application of the Fair Report Privilege." *Id.* at 10. And he says that "the Arkansas Supreme Court . . . has expanded the Fair Report Privilege in such a way as to provide less protection to private individuals from irresponsible press action than would be provided in other states, thereby violating Petitioner's Fourteenth Amendment rights." *Id.* There is no important federal question here, however.

Affirming the summary judgment against Whiteside, the Supreme Court of Arkansas applied Arkansas common law on the fair-report privilege, not the First Amendment. The Supreme Court of Arkansas, in reliance on section 611 of the Restatement of Torts, has "recognized" that privilege as a matter of common law since 1961. *See* App. 7; *Butler v. Hearst-Argyle Television, Inc.*, 49 S.W.3d 116 (Ark. 2001); *KARK-TV v. Simon*, 656 S.W.2d 702 (Ark. 1983); *Jones v. Commercial Printing Co.*, 463 S.W.2d 92 (Ark. 1971); *Brandon v. Gazette Publ'g Co.*, 352 S.W.2d 92 (1961). While the Supreme Court of Arkansas cited federal constitutional principles once—and only once—in its decision, *see* App. 12, it reached its holdings chiefly in reliance on its own precedent and the Restatement, not decisions regarding federal constitutional law. Whiteside appears to recognize as much when he observes that the first issue he raises concerns "an area of unresolved law *in Arkansas*." Pet. 21 (emphasis added).

Whether the First Amendment even provides a constitutional fair-report privilege at all, moreover, is not a question presented by Whiteside's petition. The petition, instead, focuses on the application of the privilege, as recognized in Arkansas, to the facts of this case. Applying federal law to either of the questions actually presented by the petition would not alter the common law of Arkansas in regard to the fair-report privilege or command a different result in this case under Arkansas law. For these reasons, Whiteside fails to raise an important issue of law in regard to the First Amendment.

Whiteside never even presented his contention about his "Fourteenth Amendment rights" to the Arkansas courts. Thus, he did not preserve it for review by this Court. *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 464 (1993) (a point not "squarely argue[d]" in the state supreme court is waived); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 77-78 (1988) (there should be no doubt that the substance and nature of the federal claims were raised below in the time and manner required by state law). In any event, he makes no argument on that point in his petition, which is indicative of the seriousness with which this Court should treat it. Whiteside's failure to raise any important issue of federal law warrants the summary denial of his petition.

B. The Petition Demonstrates No Conflict With a Decision of This Court, a Federal Court of Appeals, or Another State Court of Last Resort

In addition to failing to raise an important issue of federal law, Whiteside's petition incorrectly seeks certiorari on the ground that the decision of the Supreme Court of Arkansas conflicts with the decisions of courts in other jurisdictions. It does not.

1. The Petition Demonstrates No Conflict on the Requirement of Official Action

Whiteside first attacks the Supreme Court of Arkansas's holding that "there was an official action and the information released on the AEGIS system was covered by the fair-report privilege." App. 10. As the Supreme Court of Arkansas correctly observed,

however, various jurisdictions agree that, generally, information released by law-enforcement personnel, including reports and records, constitutes a report of an official action subject to the fair-report privilege. *Id.* at 9 (citing, *inter alia*, *Yohe v. Nugent*, 321 F.3d 35 (1st Cir. 2003) (statements made to press by police chief based on witness statements); *Kenney v. Scripps Howard Broad. Co.*, 259 F.3d 922 (8th Cir. 2001) (information obtained from missing-person report, pick-up order, and investigative report); *Porter v. Guam Publ'n, Inc.*, 643 F.2d 615 (9th Cir. 1981) (police investigation obtained from "daily police bulletin" of criminal complaints and arrest reports, even when based on false charges); *Thomas v. Tel. Publ'g Co.*, 929 A.2d 993 (N.H. 2007) (information obtained from pre-sentence investigation report)).

Whiteside cites no conflicting authority from this Court, a federal court of appeals, or another state court of last resort. In *Wynn v. Smith*, a case on which Whiteside relies, the Nevada Supreme Court held "that unauthorized or confidential investigatory reports do not qualify as an 'official action or proceeding' under the fair report privilege." 16 P.3d 424, 430 (Nev. 2001). That holding does not conflict with the holding of the Supreme Court of Arkansas. The Nevada Supreme Court, moreover, reached its decision after considering a Scotland Yard report that was not accessible to the public and that Scotland Yard itself never recognized as "official." *Id.* "The report was never sent to the British Gaming Control Board, which urged Scotland Yard to compile the report, and the report was archived for being substandard and unsubstantiated." *Id.* In *Phillips v. Evening Star Newspaper Company*, the District of

Columbia Court of Appeals declined to extend the common-law privilege to a "hot line log." 424 A.2d 78, 89 (D.C. 1980). The court observed that "the log represents little more than an informal arrangement between the police and the media, a joint venture, which consists of nothing more sanctified than unofficial statements of police regarding a crime." *Id.* These facts are not analogous to the instant case. Officer Goemmer not only filed a report based on the witness statements about which Whiteside complains but also conducted an initial investigation, which he recounted in his report, and the Arkansas State Police commenced an investigation. App. 10. Whiteside is wrong to argue that the cases he cites "conflict" with the decision of the Supreme Court of Arkansas.

The remaining cases cited by Whiteside on this point are not from this Court, federal courts of appeals, or state courts of last resort, and, in any event, they are inapposite, too. In *Reilly v. Associated Press*, 797 N.E.2d 1204 (Mass. Ct. App. 2003), the Massachusetts Court of Appeals held that the fair-report privilege did not protect a media defendant's publication of statements concerning a dog's missing veterinary records and harassing telephone calls made to a veterinary hospital's business manager. The court reached that conclusion because the article at issue did not report on any investigation or police action following the statements to police and therefore did not report on any official government action. In this case, in contrast, *The Courier* reported about an investigation and other actions taken by law-enforcement personnel following a complaint to police and the prosecuting attorney's decision not to press charges based on that

complaint. The Supreme Court of Arkansas thus correctly held that "there was an official action." App. 10. *Lewis v. NewsChannel 5 Network L.P.*, 2005 WL 3237681 (Tenn. Cir. Ct. Jan. 10, 2005), upon which Whiteside also relies, is an unpublished decision by a Tennessee trial court that Whiteside admits "applied to media reports of police arrests or stops, neither of which were involved in the instant case." Pet. 14.

2. The Petition Demonstrates No Conflict on the Relevance of "Malice"

Whiteside's second argument purportedly is that the Supreme Court of Arkansas's holding that malice is irrelevant to the application of the fair-report privilege conflicts with other jurisdictions. Whiteside cites four supposedly conflicting cases. Only one of them, *Solaia Technology, LLC v. Specialty Publ'g Co.*, 852 N.E.2d 825 (Ill. 2006), came from a state court of last resort. Two, *Salzano v. North Jersey Media Group*, 958 A.2d 1023 (N.J. Super. A.D. 2008), and *Newell v. Field Enterprises, Inc.*, 415 N.E.2d 434 (Ill. Ct. App. 1980), are from intermediate state appellate courts. The final, *Stokes v. CBS, Inc.*, 25 F. Supp. 2d 992 (D. Minn. 1998), is a decision from a federal district judge. In any event, Whiteside cites these cases for the unremarkable proposition that a publisher can lose the benefit of the fair-report privilege by failing to provide a fair abridgement of the relevant official action. Pet. 28. That proposition does not conflict with any holding of the Supreme Court of Arkansas and does not support certiorari here.

C. The Petition Seeks Review of the Application of Correctly Stated Rules of Law to the Facts of the Case

Whiteside does not really argue with any statement of law by the Supreme Court of Arkansas. His petition amounts to no more than arguments that the Supreme Court of Arkansas misapplied correctly stated rules of law to the peculiar facts of this particular case. Such a contention "rarely" results in a grant of certiorari. S. Ct. R. 10. It should not result in one here.

1. The Supreme Court of Arkansas Correctly Stated the Rule of Arkansas Law Governing Official Action

Whiteside first complains about the Supreme Court of Arkansas's holding that "there was an official action and the information released on the AEGIS system was covered by the fair-report privilege." App. 10. The relevant rule of law is that "'[t]he publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting on a matter of public concern is privileged if the report is accurate and complete or a fair abridgment of the occurrence reported.'" *Id.* at 7-8 (quoting *Restatement (Second) of Torts* § 611 (1977)). The Supreme Court of Arkansas noted that information released by law-enforcement personnel, including reports and records, generally constitutes a report of an official action subject to the fair-report privilege. *Id.* at 9. Whiteside does not argue with this correctly stated rule of law; he disputes the application of this rule of law to the facts of this case. He argues, "Whether the Russellville Police Department

voluntarily released the subject witness statements is a *material fact question* in determining whether the statements are 'public' documents and thus subject to the Fair Report Privilege." Pet. 12-13 (emphasis added). And he challenges the Circuit Court's conclusion, affirmed by the Supreme Court of Arkansas, that "there is no dispute that the police report . . . was voluntarily and legally released for public consumption when [the Russellville Police Department] released the report and statements therein to [Paxton Media]." Pet. 17-18 (first brackets in original). His argument is all about the facts, not the law.

In any event, the facts, properly considered, support the Supreme Court of Arkansas's application of the correctly stated law of Arkansas in this case and support the holding of the Supreme Court of Arkansas that the undisputed facts show official action. It is undisputed that Roper and Robison gave information to Officer Goemmer that implicated Whiteside and others in an alleged rape and that Officer Goemmer generated a report that recounted the information Roper and Robison gave to him. Officer Goemmer also detailed his responsive actions. He noted that he could not question Huckabay at the time of the report by Roper and Robison. He related that he followed Roper to an apartment to retrieve the clothing she wore the night of the alleged rape, learned that no one had washed the clothing since then, and instructed Roper on bagging the clothing. He revealed that he followed Roper to a specific hospital for a rape examination, identified the nurse who performed the rape examination, and detailed the chain of custody with respect to the clothing he and Roper retrieved and the material from the rape

examination the nurse performed. He also noted that he contacted a detective who responded to investigate further.

The way *The Courier* obtained the information from the Case Report and the reaction of the Police Department and the State Police to *The Courier's* having that information provide additional support for denominating the Case Report an official document. *The Courier* obtained the information from Officer Goemmer's Case Report from the AEGIS system at the Russellville Police Department, just as it routinely obtained other Police Department reports. When Perkins told Falwell that *The Courier* obtained a more extensive report than Falwell suggested the newspaper would access, Falwell never told Perkins that *The Courier* should not have received the document, never indicated that any restrictions on publication of the document existed, and never suggested that *The Courier* should not run an article based on the document. The Russellville Police Department had referred Roper's and Robison's allegations to the Arkansas State Police for investigation. Ginocchio confirmed the existence of that ongoing investigation before *The Courier* published anything about Whiteside by talking with both Gibbons and Beach. Neither of them told Ginocchio not to write a story based on Officer Goemmer's Case Report. The State Police's investigation resulted in Special Agent Rhoads's Investigative Summary and Gibbons's decision not to charge anyone with a crime, both of which *The Courier* also reported. Even if this Court accepted Whiteside's invitation to grant certiorari in a case that is more about the facts than the law, the undisputed facts support the decision of the Supreme Court of Arkansas.

2. The Supreme Court of Arkansas Correctly Stated the Rule of Arkansas Law Regarding the Substantial-Truth Doctrine

For his second point in support of certiorari, Whiteside claims, in essence, that the Supreme Court of Arkansas should have found a genuine issue of material fact as to whether Paxton Media abused the fair-report privilege. Whiteside does not quarrel, however, with the Supreme Court of Arkansas's statement of Arkansas's substantial-truth doctrine—that is, that the publisher must only report the "gist" or "sting" of the source documents to benefit from the privilege. *See* Pet. 22; App. 13-14. The detail with which Whiteside argues about the facts of the case demonstrates that his real argument is about applying Arkansas law to the facts, not about correctly stating the law.

Whiteside is, for what it is worth, totally wrong in his analysis of the facts. Whiteside complains about the fourth sentence in *The Courier's* first article about the investigation: "The Courier obtained police documents from the Russellville Police Department's AEGIS computer system detailing the victim's complaint." He says that this statement is not substantially correct because "the victim did not make a complaint of criminal conduct." Pet. 23. The facts, however, are entirely to the contrary. Officer Goemmer's Case Report identifies Roper as the victim and rape as the offense. It reveals that Roper informed Officer Goemmer that she went to a party and awoke the next morning at the same residence "sore down there" with no recollection of what happened to her the night before. Officer Goemmer

recounted that Roper "advised [him] that she had never had sexual intercourse with any of the three suspects prior to the rape." Officer Goemmer related that Roper came to the Police Department to provide this information with Robison, who divulged a graphic account of the rape of Roper that Huckabay purportedly shared with Robison. Officer Goemmer also related that he accompanied Roper to retrieve the clothes she wore the night of the party and to submit to a rape examination at a hospital. Roper testified at deposition that she reported to the police because Simmons raped her. Paxton Media, thus, was more than substantially accurate when it wrote, "The Courier obtained police documents from the Russellville Police Department's computer system detailing the victim's complaint."

Whiteside also criticizes the following sentences from the first article: "According to the police report, Huckabay checked on the victim a second time and saw Whiteside allegedly having sexual contact with the victim while Jones allegedly watched. After Huckabay asked if the men planned on 'just taking turns,' she was told to leave again, according to the cousin's statement." The information *The Courier* obtained from the Case Report states, "Huckabay told Robison she left the room but that she went back about 30 minutes later and she observed Ryan Whiteside (S-2) fingering Roper's vagina and that Kevin Jones (S-3) was in the room watching. Huckabay told Robison she was kicked out of the room again." Robison's statement in the Case Report provides, "[Huckabay] left the room went and talked went back to check on [Roper] this time Ryan was fingering her. She asked if they were just taking turns and he told her to leave." Again, the statements in the

article were substantially accurate reports of the contents of the documents Paxton Media obtained from the Russellville Police Department.

Whiteside objects to the statement "When Huckabay approached the bedroom a third time, she allegedly found the door locked, and according to the police report, text-messaged Jones, who was in the bedroom with the victim, Whiteside, and Simmons." Whiteside complains that this information appears in Robison's statement, rather than in the "blotter." Regardless where the statement appears, however, it is an undisputed fact, admitted by Whiteside, that Whiteside locked his bedroom door and that he and Jones stayed in the room while Simmons and Roper had sexual intercourse. Given this admitted fact, the source of the information (*i.e.*, Robison's statement or the blotter or some other part of the Case Report) has no relevance at all. A truthful statement cannot furnish the basis of a defamation claim in Arkansas. *Faulkner v. Arkansas Children's Hosp.*, 69 S.W.3d 393, 402 (Ark. 2002) (identifying "the statement's falsity" as an element of a defamation claim). At a minimum, the article remains substantially accurate despite a slight error in detail in attributing one piece of admittedly truthful information to the "police report" instead of more specifically to Robison's statement.

In regard to the second article, Whiteside argues that Paxton Media cannot benefit from the fair-report privilege because, in that article, *The Courier* did not include the following sentence from Gibbons's January 12 letter: "It should be noted that there is no evidence at all that Ryan Whiteside or Kevin Jones, both of whom

were also mentioned in the initial incident report, had any sexual contact with the complainant at any time during the 28th and 29th of December." The second article, however, was a substantially accurate report of Gibbons's letter and Rhoads's Investigative Summary. The headline above the article read, "No charges filed in alleged rape." The first part of the subheadline stated, "Prosecutor cites lack of evidence." The article itself reported that Gibbons "decided Friday night not to file charges in connection with an alleged rape during a Dec. 28, 2006 party at the home of Ryan Whiteside." The article relayed that Gibbons found that the case was not strong enough to prove the rape allegation given the State Police's interview of Huckabay and text messages—not e-mail messages, as Whiteside says in his petition—from the alleged victim to Simmons on December 29. The article also quoted Gibbons as saying, "There was a lack of evidence for prosecution." Whiteside's distinction between saying that a prosecutor filed no charges due to lack of evidence and saying that a prosecutor filed no charges due to a total absence of evidence is too thin to support an argument that the article was not substantially accurate.

Whiteside also argued that the fair-report privilege does not protect the second article because "the newspaper knew that the alleged source of the hearsay allegations in the witness statement denied making the allegations and had told the police that the statements were not true, yet the newspaper reported them again by way of background, thereby constituting actual malice and excessive publication." Whiteside's reference to the concepts of "actual malice" and "excessive publication" has no bearing on the Supreme Court of

Arkansas's application of the fair-report privilege in Arkansas. *See Jones*, 463 S.W.2d at 94-95. The fair-report privilege protects Paxton Media's articles because they were fair abridgements, or substantially accurate reports, of the contents of police documents. *E.g.*, *Butler*, 49 S.W.3d at 120. If the first publication has the protection of the fair-report privilege (and it does, as explained above), then the second publication of the same information has the protection of the fair-report privilege. *Jones*, 463 S.W.2d at 96. Further, in the second article, *The Courier* wrote, "Huckabay told investigators Jan. 4 she 'didn't feel that [the accuser] was being made to do things she did not want to do,' according to the report. Huckabay also denied telling the accuser's cousin she saw anyone giving the accuser drugs, or that she saw Whiteside having sexual contact with the accuser, according to the report." The article gave a substantially accurate rendition of official government information, including the reports that Huckabay denied the statements Robison attributed to her about Whiteside.

CONCLUSION

The petition for a writ of certiorari is totally meritless. It raises no important issue of federal law. It identifies no decision of this Court, a federal court of appeals, or another state court of last resort that conflicts with the decision below. And it challenges no more than the application of correctly stated rules of law to the peculiar facts of this particular case.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN E. TULL III
E. B. CHILES IV*
KRISTINE G. BAKER
QUATTLEBAUM, GROOMS,
TULL & BURROW PLLC
111 Center Street, Suite 1900
Little Rock, Arkansas 72201
(501) 379-1700

Attorneys for Respondents

* *Counsel of Record*